

No. 11118

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. E. BUELL,

Appellant,

vs.

SIMON NEWMAN COMPANY, a California,
Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

J. EVERETT BARR, ESQ.

Warrens Bldg.,
Yreka, Calif.

Attorney for Appellant.

TREADWELL & LAUGHLIN, ESQS.

Standard Oil Bldg.,
San Francisco, Calif.

Attorneys for Appellee.

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 5023

W. E. BUELL,

Plaintiff,

vs.

SIMON NEWMAN COMPANY, a California Cor-
poration,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause
of action alleges:

I.

That plaintiff is a resident of the state of Oregon
residing in the county of Multnomah, state of Ore-
gon; that the defendant is a corporation incorpo-
rated in the state of California, doing business
within the state of California; and the amount in
controversy herein exceeds the sum of Three Thou-
sand Dollars (\$3,000.00).

II.

That upon the first day of January, 1944 de-
fendant and the Montague Water Conservation
District, a municipal corporation of the state of
California, entered into a certain written lease of
real property, a copy of which is attached hereto
and designated Exhibit "A" and which is incor-
porated herein as if fully set out.

III.

That by virtue of said lease there has become due from the defendant certain rentals, the amount of which is not known to plaintiff but which plaintiff alleges on information and belief to be in excess of \$3,500.00.

IV.

That thereafter this honorable court in a certain proceeding in regard to the Montague Water Conservation District, Bankrupt, No. 10503 approved a certain agreement of composition between plaintiff as trustee for certain bondholders of the [1*] Montague Water Conservation District and the Montague Water Conservation District whereby the said Montague Water Conservation District assigned to plaintiff all the rents due the said Montague Water Conservation District in the year 1944.

V.

That defendant refused and still refuses to pay said rent to plaintiff or to said Montague Water Conservation District although demand has been made upon it to do so.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. For an accounting of the rents due plaintiff by terms of said lease and by composition agreement.

*Page numbering appearing at foot of page of original certified Transcript of Record.

2. For all other relief which may be equitable.

J. EVERETT BARR

Attorney for plaintiff

State of California

County of Siskiyou—ss.

J. Everett Barr, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above action; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to such matters, that he believes it to be true;

That this verification is made by affiant instead of by said plaintiff, personally for the reason that said plaintiff is now residing out of the state of California, where said affiant has his office.

J. EVERETT BARR

Subscribed and sworn to before me this 31st day of October, 1944.

[Seal]

BARBARA RANDOLPH

Notary Public in and for the County of Siskiyou,
State of California

[Endorsed]: Filed Nov. 1, 1944. [2]

EXHIBIT A
CROP LEASE

This Indenture, made this First day of January one thousand nine hundred and forty-four between Montague Water Conservation District, the party of the first part, hereinafter called "lessor" and Simon Newman Company the party of the second part, hereinafter called "lessee".

Witnesseth: that the lessor, for and in consideration of the covenants hereinafter mentioned on the part of the lessee to be kept and performed, has let and by These Presents does let unto the lessee, for a term of one year (12 months) commencing on the 1st day of January, 1944, and ending on the 31st day of December, 1944, all those certain parcels of land situate in the Montague Water Conservation District, County of Siskiyou, State of California, bounded and described as follows:

East $\frac{1}{2}$ of Southeast $\frac{1}{2}$ of Southwest $\frac{1}{4}$; Southeast $\frac{1}{4}$; East $\frac{1}{2}$ of Northeast $\frac{1}{4}$, Section 31; All of Section 32; Northwest $\frac{1}{4}$; West $\frac{1}{2}$ of Northeast $\frac{1}{4}$; Northeast $\frac{1}{4}$ of Northeast $\frac{1}{4}$; West $\frac{1}{2}$ of Southwest $\frac{1}{4}$; Northeast $\frac{1}{4}$ of Southwest $\frac{1}{4}$; Northwest $\frac{1}{4}$ of Southeast $\frac{1}{4}$, Section 33; West $\frac{1}{2}$ of Southwest $\frac{1}{4}$, Section 27; South $\frac{1}{2}$, Section 28, South $\frac{1}{2}$, Section 29; Southeast $\frac{1}{4}$ of Southeast $\frac{1}{2}$, Section 30; less fractional part of 134.4 acres in East $\frac{1}{2}$ of Southeast $\frac{1}{4}$ of Southwest $\frac{1}{4}$ and Southeast $\frac{1}{4}$ of Section 31, Acres more or less 1965.6.

To Have and to Hold the said premises unto the lessee, for and during the term aforesaid, together with all the appurtenances thereto appertaining.

In Consideration Whereof the said lessee hereby covenant and agree to and with the said lessor that he will occupy, till and in all respects cultivate all of the herein described premises during the term hereof in a farmer-like manner and according to the usual course of farming practiced in the neighborhood; that he will not allow any of the tillable land herein demised to remain uncultivated or untilled but all of the same shall be devoted wholly to growing crops or summer fallowed in accordance with the [3] usual practice ordinarily followed in the neighborhood. That he will at his own cost, keep the fences and buildings on the premises in good repair, reasonable wear thereof and damage by elements excepted.

That lessee will deliver to the lessor, or its order, one equal one-fourth ($\frac{1}{4}$) of all of the proceeds and crops produced on said premises of every kind and description, any and all hay produced to be divided on said premises in stack; all grain to be divided and lessor's share to be delivered to Montague Water Conservation District, at Montague, California either in cars or to the warehouse in Montague, California of said lessor in seasonable time after such crop shall have been gathered and harvested. The products so delivered to be an average quality of crops raised on the above described lands.

It Is Further Agreed that lessee shall furnish all seed necessary to be sown on said premises; that lessee will do, or cause to be done, all necessary work in and about the cultivation of said premises; that the lessee have full permission to enclose and pasture, or till and cultivate said premises, so far as the same may be done without injury to the reversion; and that lessee will give up and yield peaceable possession of the said premises at the expiration of the said term. The lessee shall furnish on said premises, at the proper time, all sacks needed for the handling of the grain delivered to the lessor sufficient to hold all the grain coming to the lessor.

It Is Further Agreed, that the parties of the second part will, at their own expense, furnish all necessary material for fencing and construct all necessary fences required to be constructed.

It Is Further Agreed and Understood that this lease and [4] agreement is executed by the lessor and accepted by the lessee in full understanding of, and subject to all the rights, privileges, restrictions, duties and obligations of the lessor under the terms and conditions of a certain plan of Municipal Debt Readjustment, and petition for confirmation now on file in the United States District Court, for the Northern District of California, Northern Division and numbered 10503 therein. The lessor shall not be accountable for, nor liable to the lessee for any act on its part done in effecting or carrying out the terms and provisions of said

plan nor of any act requiring of it to be done by order of Court in said proceedings.

It is Further Agreed that lessee is expressly prohibited from assigning or sub-letting all or any part of the demised premises without the written consent of the lessor.

This lease made in accordance with, and subject to the provisions of the Irrigation District Act and the Revenue and Taxation Code of the State of California and may be cancelled in accordance with the provisions of Section 3656 of the said Revenue and Taxation Code.

In Witness Whereof, the said party of the first part has caused its president's and Secretary's signatures and its seal to be hereunto affixed by a resolution thereunto duly authorized and said party of the second part has caused his name to be subscribed thereunto.

[Seal]

MONTAGUE WATER CON-
SERVATION DISTRICT

By SIDNEY O'CONNOR

Pres.

By ROY E. SWIGART

Secy.

Party of the First Part

[Seal]

SIMON NEWMAN CO.

By LOUIS NEWMAN,

Pres.

Party of the Second Part [5]

[Title of Court and Cause.]

ANSWER

Now comes Simon Newman Company, a California corporation, defendant in the above action, and answering the complaint, admits, alleges and denies as follows, to-wit:

I.

Defendant admits all the allegations of Paragraph I of said complaint except that it denies that the amount in controversy herein exceeds the sum of \$3,000.00.

II.

Defendant admits the allegations of Paragraph II of said complaint.

III.

Defendant denies all of the allegations of Paragraph III of said complaint.

IV.

Defendant admits that in the proceeding therein referred to, the Court approved a certain agreement set forth in said proceeding, but it denies that said agreement assigned to plaintiff all the rents due the said Montague Water Conservation District in the year 1944. On the contrary, the only provision in said agreement regarding rents was that contained in Paragraph VIII of said agreement to the effect that "All income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders," and no rents or royalties have ever accrued under said lease.

V.

Said defendant admits that it has refused and still refuses to pay any sum claimed by plaintiff as rent of said property, although demand has been made upon it to do so, but denies that any rent ever accrued under said lease or otherwise. [6]

VI.

Further answering said complaint, said defendant alleges that at the time of the execution of said lease and at the time that the said lease went into effect, on the 1st day of January, 1944, there was a crop of grain planted on said property. Thereafter and on the 27th day of May, 1944, the Montague Water Conservation District sold and conveyed all of the leased property to this defendant, Simon Newman Company, in consideration of the payment of \$32,420.85 by this defendant to the said Montague Water Conservation District, and at that time the said lease was merged in the title of said land. Up to that time the said crop of grain was about six inches high, and no crops of any kind had been taken off said land and no rent whatever under said lease had accrued, and title to said property, upon said merger, entirely vested in said Simon Newman Company and no part of said property or the crop thereon, as rent or otherwise, since belonged to said Montague Water Conservation District or the plaintiff herein. Pursuant to the provisions of said composition agreement and said order of this Court, the said W. E. Buell, in consideration of the payment to him of

said sum of \$32,420.85, made, executed and delivered a certificate of release, a copy of which is attached hereto marked Exhibit "A", and thereby released any claim that he had to said crop as rent of said land. Defendant further alleges that thereafter the said crop was matured and harvested by the defendant and one-quarter of said crop as matured and harvested was of the value of \$3,327.00, but it alleges that neither the Montague Water Conservation District nor the said plaintiff is entitled to any part thereof. It further alleges that said Montague Water Conservation District makes no claim to any rent under said lease. [7]

Wherefore, defendant prays that plaintiff take nothing by his said action and that defendant be discharged with its costs.

TREADWELL & LAUGHLIN
EDWARD F. TREADWELL
REGINALD S. LAUGHLIN

Attorneys for defendant

[Endorsed]: Filed Dec. 13, 1944. [8]

EXHIBIT A

No. 213

CERTIFICATE OF RELEASE

This Is to Certify that W. E. Buell, as trustee, has received from Simon Newman Company (a) the sum of \$32,420.85 in cash, the receipt of which is hereby acknowledged.

In consideration of the above payment and pursuant to the provisions of that certain contract dated Dec. 6th, 1943, and entered into by and between W. E. Buell and the Montague Water Conservation District and which contract was thereafter approved and confirmed by the District Court of the United States for California in a decree entered the 4th day of March, 1944, in the case numbered 10503 entitled "In the Matter of the Montague Water Conservation District" and which decree has been filed in the records of the County Recorder of Siskiyou County, California in Book 61, Page 20 of Official Records of Siskiyou County.

The undersigned W. E. Buell, acting on behalf of all of the present outstanding bondholders of the Montague Water Conservation District as provided in the decree of the District Court of the United States for California, just above mentioned, does by these presents forever release the hereinafter described real property, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District.

Land Description:

The $E\frac{1}{2}$ of $SE\frac{1}{4}$ of $SW\frac{1}{4}$; $E\frac{1}{2}$ of $NE\frac{1}{4}$ and $SE\frac{1}{4}$, of Sec. 31; all of Sec. 32 $NW\frac{1}{4}$; $W\frac{1}{2}$ of $NE\frac{1}{4}$ the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$; $W\frac{1}{2}$ of the $SW\frac{1}{4}$; $NE\frac{1}{4}$ of the $SW\frac{1}{4}$; $NW\frac{1}{4}$ of the $SE\frac{1}{4}$; all in Sec. 33; [9] $W\frac{1}{2}$ of the $SW\frac{1}{4}$; of Sec. 27; the $S\frac{1}{2}$ of

Sec. 28 the S $\frac{1}{2}$ of Sec. 29; the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ in Sec. 30; all in T46N R5W MDBM, Less the property described as follows: Beginning at a point on the south line of Sec. 31, T46N R5W MDBM, from which the SE corner of said Sec. 31 bears south 89° 51' East 3222.73 ft. and the NW corner of Sec. 6 T45N R5W, MDBM, bears North 89° 50' West 1215.27 ft. thence North 19° 44' 10" East 2808.55 ft. to a point on the North line of the SE $\frac{1}{4}$ of said Sec. 31 thence South 89° 50' East 1758.6 ft. to a point, thence South 0° 0' East 2646.5 ft. to a point on the South line of said Sec. 31, thence North 89° 50' West 2708.73 ft. to the place of beginning, containing 135.1 acres more or less.

Dated this 18th day of November, 1944.

/s/ W. E. BUELL

Trustee

State of California

County of Siskiyou—ss.

On this 18th day of November, 1944, before me, a Notary Public, personally appeared W. E. Buell, Trustee, known to me to be the person who signed the foregoing release and acknowledged to me that he signed the same as his free and voluntary act for the uses and purposes therein contained.

[Seal] /s/ BARBARA RANDOLPH

Notary Public in and for the County of Siskiyou,
State of California

My commission expires Jan. 3, 1948 [10]

This is to certify that the Montague Water Conservation District has on this 24th day of November, 1944, cancelled on the assessment roll of the said District, all assessments for bonds and interest levied upon the lands described herein and agrees that all future assessments for paying the present outstanding bonded indebtedness on said bonds will be cancelled pursuant to the decree of the United States District Court mentioned herein.

[Seal]

MONTAGUE WATER CON-
SERVATION DISTRICT

By /s/ ROY E. SWIGART
Secretary [11]

[Title of Court and Cause.]

NOTICE OF MOTION TO STRIKE

To Defendant Simon Newman Company and to
Edward F. Treadwell and Reginald S. Laugh-
lin, Treadwell & Laughlin, Its Attorneys:

You and each of you will please take notice that upon the 2nd day of January, 1945, at the hour of 10 o'clock A. M. of said day at the regular place of setting of the above entitled court in the Post Office Building, Sacramento, California, the plaintiff will move to strike the following portions of defendant's answer:

Paragraph VI together with Exhibit A.

That said motion will be made upon the ground

that said portion of said answer is redundant, superfluous and does not constitute a valid defense.

Dated: December 18th, 1944.

J. EVERETT BARR

Attorney for Plaintiff

[Endorsed]: Filed Dec. 20, 1944. [12]

[Title of Court and Cause.]

STIPULATION AS TO FACTS

The parties to the above entitled action hereby stipulate to the following facts:

I.

The plaintiff is a resident of the State of Oregon, residing in the County of Multnomah, and defendant is a corporation incorporated in the State of California, doing business in the State of California.

II.

On the 1st day of January, 1944, defendant and Montague Water Conservation District entered into the written lease, Exhibit "A" attached to the complaint.

III.

At the time of the execution of said lease and at the time that said lease went into effect on the 1st day of January, 1944, there was a crop of grain planted on said property. On the 27th day of May, 1944, the District sold and conveyed the leased land

to defendant in consideration of the sum of \$32,420.85. Up to that time the crop of grain was about six inches high and no crops of any kind had been taken off said land. At a later date the crop was matured and harvested by defendant, and one-quarter of said crop as matured and harvested was of the value of \$3,327.00.

IV.

The Court may take judicial notice of the proceedings in Montague Water Conservation District, bankrupt, No. 10503, and the agreement of composition therein, and it is stipulated that in Paragraph VIII of said agreement it was provided that "All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders". [13]

V.

On the 18th day of November, 1944, W. E. Buell, in consideration of the payment to him of said sum of \$32,420.85, made, executed and delivered the certificate marked Exhibit "A" attached to the answer herein. This admission is made subject to the motion of plaintiff to strike said certificate from the answer, and subject to any objection thereto which plaintiff may desire to make on the trial.

VI.

Montague Water Conservation District makes no

claim against Simon Newman Company for any rent under said lease.

J. EVERETT BARR

Attorney for Plaintiff

TREADWELL & LAUGHLIN

Attorneys for Defendant

[Endorsed]: Filed Jan. 18, 1945. [14]

[Title of Court and Cause.]

OPINION AND ORDER.

Plaintiff sued defendant for rentals which he claimed exceeded \$3500.00, and became due under a lease by Montague Water Conservation District (hereinafter referred to as the "District"). The said plaintiff is the Trustee in the matter of the Montague Water Conservation District, Bankruptcy No. 10,503 in this court. Said lease was made and entered into by and between said District and defendant on the 1st day of January, 1944. A copy thereof is attached to plaintiff's complaint as Exhibit "A".

Defendant denied in its answer that any rent was due and alleged that at the time said lease went into effect the crop of grain on the lands so leased was about six inches high; that on the 27th day of May, 1944, said District sold and conveyed all of the leased property to defendant in consideration of the payment of \$32,420.85, at which time said lease was merged in the title of said land;

and that said plaintiff executed and delivered to plaintiff a release of any claims, a copy of which was attached as Exhibit "A" to said answer.

Plaintiff moved to strike said affirmative defenses and said exhibit from defendant's answer.

The parties stipulated as to certain facts, the material portions of which stipulation are as follows:

"II.

On the 1st day of January, 1944, defendant and Montague Water Conservation District entered into the written lease, Exhibit 'A' attached to the complaint.

III.

At the time of the execution of said lease and at the [15] time that said lease went into effect on the 1st day of January, 1944, there was a crop of grain planted on said property. On the 27th day of May, 1944, the District sold and conveyed the leased land to defendant in consideration of the sum of \$32,420.85. Up to that time the crop of grain was about six inches high and no crops of any kind had been taken off said land. At a later date the crop was matured and harvested by defendant, and one-quarter of said crop as matured and harvested was of the value of \$3,327.00.

IV.

The Court may take judicial notice of the proceedings in Montague Water Conservation District, bankrupt, No. 10503, and the agreement of composition therein, and it is stipulated that in Paragraph

VIII of said agreement it was provided that 'All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders'.

V.

On the 18th day of November, 1944, W. E. Buell, in consideration of the payment to him of said sum of \$32,420.85, made, executed and delivered the certificate marked Exhibit 'A' attached to the answer herein."

Both the lease and the release above mentioned refer to the agreement of composition, dated the 6th day of December, 1943, between plaintiff herein and the District.

The lease recited that it was "executed by the lessor and accepted by the lessee in full understanding of, and subject to all the rights, privileges, restrictions, duties and obligations of the lease under the terms and conditions of a certain plan of Municipal Debt Readjustment and petition for confirmation now on [16] file in the United States District Court for the Northern District of California, Northern Division, and numbered 10503 therein." It thereby put both of its executing parties on notice as to the terms and provisions of said plan and the court proceedings with respect thereto. Said plan contemplated the full release of all lands whereon payments of the amounts specified in said agreement were made.

Said release also referred to the same plan. It recited: "In consideration of the above payment,

and pursuant to the provisions of that certain contract dated Dec. 6th, 1943, and entered into by and between W. E. Buell and the Montague Water Conservation District . . . (Buell) does by these presents forever release the hereinafter described real property, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District."

This, again, emphasizes that all transactions between the parties to this litigation and the District, subsequent to December 6, 1943, were conditioned upon and made pursuant to the said agreement between plaintiff and said District on said December 6, 1943.

The primary purpose of all the dealings of plaintiff, defendant and said District was to carry out the intentions of the contracting parties to the first agreement of December 6, 1943. Included among such intentions appears that of inducing former owners of the lands in said District to buy back such lands from the District so that revenue could again be derived therefrom.

Evidently this purpose was accomplished as to the lands herein involved, for defendant raised sufficient funds to consummate a deal. The amount of the price, to-wit: \$32,420.85, was [17] satisfactory to both plaintiff and defendant. That this was entirely satisfactory is shown by the fact that neither party has sought to avoid responsibility under either the sale or the release. It does not

seem reasonable for this suit to be maintained as an aftermath.

Said plaintiff and defendant, when so contracting on November 18, 1944, must have had in contemplation that the price agreed upon was the full amount which defendant was to pay and plaintiff was to receive. As reference was directly made to the agreement of December 6, 1943, between plaintiff and the District, said plaintiff must have realized that his delivery of the deed to defendant would end the payment of money to him by defendant by reason of any and all transactions then, and theretofore, had between them.

The original document referred to by the parties as the agreement of composition was filed in this court on the 10th day of December, 1943. It was therein recited that said parties submitted a plan of adjustment in accordance with the provisions of Sections 81 to 84 of the United States Bankruptcy Act; that said Buell, as trustee for all bondholders, would accept from any individual landowner in the District in full settlement of the liability of such landowner for the payment of all his outstanding bonds and coupons of the District, whether due or to become due, the amount set forth in Exhibit "B", attached thereto, opposite the description of said land.

Certain land described in said Exhibit "B" was designated "Tract No. 62 District—formerly Simon Newman Company . . . 135.1 acres."

It was further recited that if the specified "cash price" were paid in cash on or before ninety days

after the final confirmation of this plan by the United States District Court as provided in paragraph 3 of said agreement, said Buell would give full release therefor. [18]

It was also provided, in paragraph 8, "all income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders."

Plaintiff's contention in his complaint herein is that said bondholders thereby became entitled to the sum of \$3500.00, by reason of the lease (Exhibit "A" to said complaint), which provided that the lessee will deliver to the lessor, or its order, one-fourth ($\frac{1}{4}$ th) of all of the proceeds and crops produced on said premises of every kind and description.

It was further provided, in paragraph 9, of said agreement that whenever land had been released from obligation pursuant to said agreement, the said trustee would make, execute and deliver to the owner of said land a release substantially in the form of Exhibit "C" thereto attached. Exhibit "A" annexed to defendants' answer is substantially in the form of said Exhibit "C" attached to said agreement of composition.

The Court is inclined to agree with defendant that the execution of said release, taken in conjunction with all the other documents stipulated to have been executed, indicated that not only the land, but defendant, as the purchaser thereof, was released from any further liability for payments to the District or to plaintiff as trustee.

One of the cardinal rules in the interpretation of contracts is that courts should endeavor to ascertain the intention of the parties.

The District and the defendant when entering into the crop lease used the expression "proceeds and crops produced on said premises" with reference to the percentage of one-fourth which the lessee (defendant) was to deliver to the lessor (District). This indicates that they intended that the crops should be matured [19] and harvested before the percentage would become due to the District. Otherwise, there would be no "proceeds" to pro rate. Neither would there be any crops to divide. That such was the intention is further indicated by the reference to hay and grain, thus—"any and all hay produced to be divided on said premises in stack; all grain to be divided and lessor's share to be delivered to Montague Water Conservation District at Montague, California, either in cars or to the warehouse in Montague, California, of the said lessor in seasonable time after such crop shall have been gathered and harvested."

Obviously the hay could not be delivered until it had been cut and stacked. The grain could not be divided or delivered as provided until after it had been "gathered and harvested."

The stipulation as to facts sets forth that on the 27th day of May, 1944, when the District sold and conveyed the leased land to defendant, "the crop of grain was about six inches high and no crops

of any kind had been taken off said land." There was, at said time, therefore, no crop to divide, and there were no proceeds to pro rate.

There was, accordingly, not sufficient evidence to sustain plaintiff's allegation that there was due from defendant rentals in the amount of \$3500.00, or thereabouts.

Defendant set up in its answer that the lease was merged in the title of said land when it made the purchase from the plaintiff; that upon the vesting of the title in defendant, no part of said property or the crop thereon, as rent or otherwise, belonged to the District or to plaintiff.

It was said in *Jameson v. Hayward*, 106 Cal. 683, 39 Pac. 1078: ". . . equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual and just intent of the parties." What has been said hereinbefore [20] indicates the view of this Court with reference to the intention of the District and plaintiff in entering into the lease. It is our further view that plaintiff, by the terms of the agreement of December 6, 1943, and of the release of November 18, 1944, intended that all liability of defendant with respect to the District, the bondholders and plaintiff acting in his representative capacity, would be discharged by the payment of the sum of \$32,420.85 when he delivered to it the deed.

It is likewise our view that the purposes of justice will be best subserved by holding that no rent was due from defendant to plaintiff at the

time of the commencement of the above entitled action. It would be unconscionable, under the circumstances of this case, to require defendant to pay plaintiff rental on a crop which was but six inches high at the time defendant became the owner of the land whereon said crop was growing.

The doctrine of merger is well explained in annotation in 143 A.L.R., 93-132. It is therein stated that "whenever an estate for years and a greater estate vest in the same person without any intermediate estate, the estate for years is merged in the greater estate." (p. 96)

Otis v. McMillan, 70 Ala. 45, is cited on the point: "There can be no greater absurdity, than to place Otis in the relation of being his own landlord and his own tenant at one and the same time." (p. 97)

Chancellor Kent is quoted: "There would be an absolute incompatibility in a person filling at one and the same time the character of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity, of the doctrine of merger." (p. 97)

The Annotator states on page 124: "Where a leasehold estate for years is absorbed by the operation of the doctrine of merger, the lessee's obligation to pay rent is terminated." [21]

Erving v. Goodman Company Bank, 171 Cal. 559, 153 Pac. 945, and other California cases, together with several other jurisdictions are cited in support thereof. In the Erving case it was said (p. 563): "That when the fee vested in the bank's predeces-

sor, the covenant to pay rent for the realty became of no effect.”

We believe that a reasonable construction of all the agreements referred to in the pleadings and the stipulation as to facts, and the proceedings in the bankruptcy matter, of which this Court is to take judicial notice pursuant to said stipulation, leads to the conclusion that the bondholders, on whose behalf plaintiff is acting, are not entitled to receive the allotted payment of \$32,420.85 made by defendant as a purchaser of the lands, and rentals in addition.

It Is Therefore Ordered that plaintiff's motion to strike be, and the same is, hereby denied, and that defendant have judgment, with costs.

Counsel for defendant will prepare findings.

Dated: June 20, 1945.

MARTIN I. WELSH

United States District Judge

[Endorsed]: Filed June 21, 1945. [22]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 21st day of June, in the year of our Lord one thousand nine hundred and 45.

Present: The Honorable Martin I. Welsh.

[Title of Cause.]

The motion to strike and this case having been heretofore heard and submitted, being now fully

considered, and the Court having filed its written opinion and order thereon, it is, in accordance with said opinion and order, Ordered that the motion to strike be and the same is hereby denied. It is further Ordered that judgment be entered herein in favor of the defendant and against the plaintiff with costs, upon findings of fact and conclusions of law to be prepared by the defendant and submitted to the Court. [23]

[Title of Court and Cause.]

FINDINGS OF FACT

From the pleadings and stipulation as to facts, the Court finds the following to be the facts:

I.

The plaintiff is a resident of the State of Oregon, residing in the County of Multnomah, and defendant is a corporation incorporated in the State of California, doing business in the State of California.

II.

On the 6th day of December, 1943, an agreement was entered into between W. E. Buell, acting on behalf of the bondholders of Montague Water Conservation District, hereinafter referred to as the District, and Montague Water Conservation District, reciting that the District was an irrigation district duly organized under the laws of the State

of California; that it had issued coupon bonds in the total sum of \$1,395,000; that the bonds and coupons thereon were unpaid; that Buell was the hold of 90.9% of the outstanding bonds; that the bonds and coupons were in an amount greater than the District could pay; that negotiations between Buell and the District had been carried on, looking toward a compromise and a reduction of the outstanding bonded indebtedness of the District, and a waiver of the general obligation feature of the bonded indebtedness and an agreement permitting any individual land owner to pay his adjusted share of the outstanding bonded indebtedness and thus relieve his land of further liability for the payment of all the outstanding bond and interest indebtedness; and that a schedule had been prepared in which each tract of land in the District had been listed and an amount set opposite the same, which schedule was attached to the contract and marked Exhibit "B". [24]

(Said schedule set forth a description of the land described in the lease hereinafter referred to, giving the record title holder as "District Formerly Simon Newman Company", the number of acres as 1964.9, and the cash price as \$32,420.85.)

It was then agreed that a plan of adjustment in accordance with the provisions of Sections 81 to 84 of the United States Bankruptcy Act should be submitted to the United States District Court for the Northern District of California, which plan should be in substance as follows:

1. That Buell, as Trustee for the bond holders, would accept from any individual land owner the amount set forth in said schedule, if paid in cash on or before 90 days after the final confirmation of the plan, and would give full release therefor.

2. That in lieu of cash said Buell would accept from any land owner a note and deed of trust on the land for such amount.

3. That with respect to all private properties purchased by the District for non-payment of assessments, upon the expiration of 90 days from the date of final confirmation of the plan the District would execute and deliver to Buell a deed thereof, and that all land so conveyed to Buell should be released from liability to pay the outstanding bonds and coupons.

4. That all payments made to Buell, as Trustee for the bond holders, under the plan, or received by him from the sale or rental of any lands acquired by him by deed from the District or by foreclosure of any mortgage or deed of trust held by him, should be deposited in the Portland Trust and Savings Bank in Portland, Oregon, for the benefit of the bond holders. [25]

5. That whenever all lands in the District have been released from liability for the payment of the bonds and coupons issued by the District, by the payment of cash or the execution of a deed of trust, Buell, as Trustee of all the bond holders, should deliver all of the bonds and coupons to the District for cancellation.

6. That the District should exclude certain land from the District, not including the land referred to in this action.

7. That individual land owners may make their offer to pay, pursuant to the terms of paragraphs I and II, either to Buell, as Trustee for the bond holders, or to the Secretary of the District.

8. "All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders, provided that if this contract shall not be approved by the United States District Court for the Northern District of California, such rentals, royalties and leases shall belong to the District. Also provided however that from such rental there shall be deducted and retained by the district an amount equal to the maintenance and operation assessments that would have been levied upon the lands from which such rental is derived had the lands been in private ownership."

9. "Whenever land has been released from obligation pursuant to paragraphs I and II hereof, the said Trustee, shall make, execute and deliver to the owner of such land a release substantially in the form of Exhibit 'C' hereto attached, which release shall be acknowledged so that it may be recorded in the records of the County of Siskiyou, State of California."

“CERTIFICATE OF RELEASE

“This Is to Certify that William E. Buell, as trustee, has received from.....(a) the sum of \$.....in cash or (b) a mortgage upon the land hereinafter described for the sum of \$....., the receipt of which is hereby acknowledged. [26]

“In consideration of the above payment delivery of mortgage and pursuant to the provisions of that certain contract dated....., 19.. and entered into by and between William E. Buell and the Montague Water Conservation District and which contract was thereafter approved and confirmed by the District Court of the United States for California in a decree entered the.....day of....., 19.. in the case numbered..... entitled ‘In the Matter of the Montague Water Conservation District’ and which decree has been filed in the records of the County Recorder of Siskiyou County, California, in Book....., Page..... of official records of Siskiyou County.

“The undersigned William E. Buell, acting on behalf of all of the present outstanding bond holders of the Montague Water Conservation District as provided in the decree of the District Court of the United States for California, just above mentioned, does by these presents forever release the hereinafter described real proppty, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the

present outstanding bonds and interest thereon of the Montague Water Conservation District.

Land Description:

“Dated this.....day of....., 19...

“WILLIAM E. BUELL,

Trustee

By.....

“State of.....:

County of.....:—ss.

“On this.....day of....., 19..., before me, a....., personally appeared, known to me to be the person who signed the foregoing release and acknowledged to me that he signed the same as his free and voluntary act for the uses and purposes therein contained.

.....
 [27]

“My commissioner expires.....”

10. “No segregation of the separately priced parcels shown in Exhibit ‘B’ will be accepted and releases will only be executed for any entire parcel of land so separately described and priced in Exhibit ‘B’.”

11. That the District would pay to the Trustee, for the benefit of the bond holders, the proceeds of certain condemnation proceedings not affecting the property involved in this action.

III.

On the 1st day of January, 1944, defendant and Montague Water Conservation District entered into the written lease, Exhibit "A" attached to the complaint.

IV.

At the time of the execution of said lease and at the time that said lease went into effect on the 1st day of January, 1944, there was a crop of grain planted on said property. On the 27th day of May, 1944, the District sold and conveyed the leased land to defendant in consideration of the sum of \$32,420.85. Up to that time the crop of grain was about six inches high and no crops of any kind had been taken off said land. At a later date the crop was matured and harvested by defendant, and one-quarter of said crop as matured and harvested was of the value of \$3,327.00.

V.

On the 18th day of November, 1944, W. E. Buell, in consideration of the payment to him of said sum of \$32,420.85, made, executed and delivered the certificate marked Exhibit "A" attached to the answer herein. [28]

VI.

Montague Water Conservation District makes no claim against Simon Newman Company for any rent under said lease.

VII.

The said plan contemplated the full release of all lands whereon payments of the amounts specified in said agreement were made, and the lease involved herein was conditioned upon and made pursuant to said agreement between plaintiff and said District of December 6, 1943. The primary purpose of all dealings of plaintiff and defendant and said District was to carry out the intentions of the contracting parties to the agreement of December 6, 1943. Included among such intentions appears that of inducing former owners of land in said District to buy back the land in said District so that revenue could again be derived therefrom. The plaintiff and defendant must have had in contemplation that the price agreed upon was the full amount which defendant was to pay and plaintiff was to receive. Said agreement contemplated that upon payment of the cash price within 90 days after confirmation of the plan, Buell should give full release. The release given by plaintiff, taken in conjunction with all the other documents, indicated that not only the land but the defendant, the purchaser thereof, was released from any further liability for payments to the District or to plaintiff, as Trustee. The lease contemplated that the crops should be matured and harvested before the percentage thereof due to the District would become due. The hay could not be delivered until it was cut and stacked, and the grain could not be divided or delivered until it was gathered and harvested. At the time of the sale the grain was the only crop on

the land and was only six inches high, and there was at that time no crop to divide and there were no proceeds to prorate and there was no rental then due [29] under the lease, and any right to rental was merged in the title which defendant obtained when it purchased the land from the District. It would be unconscionable, under the circumstances of this case, to require defendant to pay plaintiff rental on a crop which was but six inches high at the time the defendant became the owner of the land whereon said crop was grown.

VIII.

It is the reasonable construction of all agreements referred to in the pleadings and the stipulation as to facts and the proceedings in the bankruptcy matter, of which this Court is to take judicial notice, that the bond holders, on whose behalf plaintiff was acting, are not entitled to receive the allotted payment of \$32,420.85 made by defendant as the purchaser of the land, and rentals' in addition.

CONCLUSION OF LAW

As a conclusion of law the Court finds and decides that plaintiff take nothing by his action, and defendant recover its costs herein expended.

Dated this 6th day of July, 1945.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed July 6, 1945. [30]

In the District Court of the United States for
the Northern District of California, Northern
Division.

No. 5023

W. E. BUELL,

Plaintiff,

vs.

SIMON NEWMAN COMPANY, a California
Corporation,

Defendant.

JUDGEMENT

In the above entitled action, the defendant having appeared and answered and said action having been duly submitted to the Court for decision upon a stipulation as to the facts, and said matter having been argued by counsel and submitted to the Court, and the Court being now fully advised in the premises and having filed herein written findings of fact and conclusions of law,

Now, Therefore, by reason of the law and the findings aforesaid, It Is Ordered, Adjudged and Decreed that plaintiff take nothing by his said action and that defendant have and recover from plaintiff its costs of suit herein expended.

Dated this 6th day of July, 1945.

MARTIN I. WELSH

United States District Judge

[Endorsed]: Filed July 6, 1945. [31]

[Title of Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice is hereby given that W. E. Buell plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 6th day of July, 1945.

Dated and signed this 10 day of July, 1945.

J. EVERETT BARR

Attorney for Appellant

[Endorsed]: Filed July 17, 1945. [32]

[Title of Court and Cause.]

NOTICE TO PREPARE TRANSCRIPT

To the Clerk of the Above-Entitled Court:

You will please take notice that the above-entitled matter has been appealed to the Circuit Court of the United States in and for the Ninth Circuit, and the appellant herein requests that a transcript be prepared containing the following items: The Complaint on file herein together with Exhibits attached thereto; Answer of the defendant together with Exhibit attached thereto; the Stipulated Facts; Notice of Motion to Strike; the Ruling of the Court; the written Opinion of the Court, if any; the Findings of Fact and Conclusions of Law; and the Judgement.

Dated this 16th day of July, 1945.

J. EVERETT BARR

Attorney for Plaintiff

(Affidavit of service attached hereto)

[Endorsed]: Filed July 17, 1945. [33]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL.

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of *W. E. Buell vs. Simon Newman Company*, No. 5023, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Notice to Prepare Transcript, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Thirteen and 40/100 (\$13.40), and that the same has been paid to me by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 3rd day of August, A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

By F. M. LAMPERT

Deputy Clerk. [34]

[Endorsed]: No. 11118. United States Circuit Court of Appeals for the Ninth Circuit. W. E. Buell, Appellant, vs. Simon Newman Company, a California Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed August 6, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11118

W. E. BUELL,

Plaintiff and appellant,

vs.

SIMON NEWMAN COMPANY, a California cor-
poration,

Defendant and appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND
DESIGNATION OF PORTION OF REC-
ORD TO BE PRINTED.

To the Appellee Simon Newman Company and to
Treadwell and Laughlin, Its Attorneys and to
the Clerk of the Above Court:

You and each of you will please take notice that
the appellant requests that the entire transcript in
the above matter be printed.

You will further please take notice that the
appellant will rely upon the following points upon
appeal.

A. That the findings are not in accordance with
the evidence.

B. That the answer of the appellee did not state
a valid and sufficient defense.

C. That the release given by the appellant and
set forth in appellees answer did not release ap-
pellee from the contractual obligation to pay rent.

D. That the sale of the land to the appellee did not act as a merger of the title and rent in that a previous grant of the rent had been made to appellant.

Dated and Signed this 10th day of August, 1945.

.....

Attorney for Appellant.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Aug. 17, 1945. Paul P. O'Brien, Clerk.

